No. 10848

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES TOZZI, doing business as James Tozzi & Co.,
Appellant,

vs.

EMIL BALLEY,
Appellee.

Brief of Appellee

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.
Hon. Martin I. Welsh, U. S. District Judge.

WILSON S. WILEY,
608 Medical Dental Building,
Klamath Falls, Oregon,
ATTORNEY FOR APPELLEE.

SUBJECT INDEX

CODE, STATUTORY, AND MISCELLANEOUS, REFERENCES

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APPELLEE'S STATEMENT OF THE CASE

The Secretary of Agriculture of the United States, under and by virtue of the provisions of the Perishable Agricultural Commodities Act, 1930, Docket No. 4010, after a formal hearing held on March 18-19, 1942, in Stockton, California, awarded the appellee, on December 14, 1942, as reparation, the sum of $4,971.56, with interest thereon at the rate of five per cent (5%) per annum from April 6, 1940, until paid, for failure on the part of the appellant, James Tozzi & Co., to deliver to appellee, Emil Balley, 10,851 sacks of potatoes, of 100 pounds each.

The reparation order included an item of $2500.00 that appelle had advanced to the appellant on the payment of the purchase price of the potatoes. The unit price of the potatoes was $1.45 per cwt. The advance payment of $2500.00 has never been returned to appellee. Appellant resold all of the potatoes to other parties for the total sum of $18,205.51, or $2471.56 in excess of the sum of $15,733.95, the price agreed upon between the appellant and the appellee.

The item of $2471.56 was included, with the advance payment of $2500.00, in the reparation award, for the reason that the Secretary had found that the appellee had duly tendered to the appellant the full balance due on the purchase price agreed upon between the parties, and that appellee had otherwise fully performed his part of the agreement. Under such circumstances the Secretary found that the appellee had become the equitable owner of the potatoes, and was entitled to receive from the appellant the enhanced sum of money received by appellant on a resale of the potatoes, together "with interest thereon to date of payment," as provided in the Perishable Agricultural Commodities Act, 1930.

The order of the Secretary (R 39) provided that within thirty days from the date of the order the appellant pay to the appellee such reparation award. The Act provides that if such award be not paid within five days from the expiration of the period allowed for compliance with such order, or if no appeal be taken from such order, the respondent shall suffer an automatic suspension of his federal license to carry on interstate business.

Within the period allowed for compliance, however, the appellant did perfect an appeal in the District Court of the United States for the Northern District of California, Northern Division, at Sacramento, California. On November 17, 1943, a trial was had, based upon the record made before the Secretary of Agriculture as shown in the stipulation entered into between the respective parties (R 45-46). On June 6, 1944, the Court made and entered its Findings of Fact and Conclusions of Law, and, based thereon, entered judgment in favor of the appelle (R 49-56).

In substance the Court affirmed the Findings of Fact of the Secretary of Agriculture, with an additional finding in Finding No. 8: "That the sum of $18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon." The Court stated in its opinion (R 47-48): "My additional finding in this regard implies not that the basis for the measurement of damages adopted by the Secretary of Agriculture is erroneous, but that whether the transaction be regarded as a sale, or as a contract of sale, the amount of damages as fixed by the Secretary of Agriculture, for the refusal of appellant to deliver the potatoes to respondent was, in my opinion, justified by the evidence and applicable law."

On June 10, 1944, the appellant filed in the District Court of the United States for the Northern District of California, Northern Division, a motion for a new trial (R 58). This motion was argued by respective counsel, and, on July 3, 1944, it was denied by the Court (R 59).

Notice of appeal to the Circuit Court of Appeals of

the United States, Ninth Circuit, was filed on July 12, 1944, accompanied by a corporate surety supersedeas bond, which bond was approved, on the same day, by Hon. Martin I. Welsh, United States District Judge (R 63).

A Statement of the points upon which the appellant intends to rely in this appeal appears in the Record on pages 63 and 64.

APPELLANT'S ASSIGNMENT OF ERROR NO. 1

ARGUMENT

The appellant contends that the judgment entered herein is against law in this:

> "That the burden was upon plaintiff to prove damages, if any he sustained, and no damages were proven for the reason that under the law, the only damages that plaintiff could have sustained were measured by the difference between the price at which plaintiff agreed to pay defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale, and there was no evidence whatsoever as to the reasonable value of a like grade of potatoes at the time and place of sale, to-wit: April 16, 1940, in Klamath Falls, Oregon (R 101)."

In this assignment of error the appellant has designated the potatoes as "seed potatoes," and has also made the statement that the time of sale was "April 16, 1940." The fact, which we believe will be admitted, is that this controversy has arisen over the

sale of cold storage potatoes and not seed potatoes, and that the time for the delivery of the potatoes was on April 6, 1940, and not on April 16, 1940. Doubtless these errors have crept into the assignment of error through inadvertence.

The record shows that the potatoes were stored in an ice cold storage plant in Klamath Falls, Oregon (R 9), and that they were to be delivered f. o. b. at Klamath Falls on April 6, 1940 (R 69), and that "we will meet the latter part of the week for payment, which was April 6th (R 70)."

On March 29, 1940, the appellee agreed to pay to the appellant the sum of $15,733.95 for the 10,851 sacks of potatoes, and on that day did pay to the appellant's agent the sum of $2500.00 as an advance payment on the purchase price thereof (R 68).

On April 6, 1940, both the appellee and his attorney, Clarence A. Humble, offered to pay to the agent of the appellant the balance due, to-wit: $13,233.95, on the purchase price of the potatoes, and, on the same day, the appellant's agent "hollered, 'Well, I am keeping the $2500.00 and I am handing it over to my attorney (R 71),'" because appellee had refused to pay appellant's storage debt. On April 6, 1940, the appellee wired to the appellant that he was ready, on this day, to pay the agreed price at the rate of $1.45 per sack for the potatoes (R 72).

Since it appears that the time and place for the consummation of the sale and delivery of the potatoes was on April 6, 1940, at Klamath Falls, Oregon, let us examine the record in order to determine

whether any evidence was adduced by either the appellee, appellant, or both, tending to establish the value of a like grade of potatoes as of that time and place.

The appellant himself testified that "the market started showing strength" after March 15, 1940 (R 97), and also that "in fact, I think it could be verified by government reports that the market advanced between 10 to 25 cents (R 98)," doubtless meaning "to 25 cents" on April 6, 1940, the time set for the delivery of the potatoes and payment therefor. Here the appellant cited, for his authority, the government of the United States, as to market value. He also cited, for his authority, his agent, when he quoted his agent saying: "the market had advanced fully a quarter," and that the "market had advanced 15 cents or a quarter (R 99)."

The plain inference to be drawn from this evidence is that the market "of a like grade of potatoes" had advanced from $1.45 per sack, during the latter part of March, 1940, "fully a quarter," "or a quarter," or from $1.45 per sack to $1.70 per sack, by April 6, 1940, when, as Mr. Humble testified, on that date "the thing just kind of blew up and everybody walked away" (R 95).

The findings of both the District Court of the United States for the Northern District of California, Northern Division, and the Secretary of Agriculture of the United States, were to the effect that the appellee had contracted to purchase the potatoes for $1.45 per sack from the appellant, and if the market value of a like grade of potatoes on April 6, 1940, was

fully a quarter in excess of that price, or $1.70 per sack, then the market value of 10,851 sacks of a like grade of potatoes on April 6, 1940, was $18,446.70, according to appellant's own testimony, or $241.19 in excess of the amount of $18,205.51 the amount received by appellant on a resale of the 10,851 sacks of potatoes (R 98).

In addition to this evidence as to market value of a "like grade" of potatoes, in Klamath Falls, Oregon, as of April 6, 1940, brought forward by the appellant, the appellee testified as to the market value of a like grade of potatoes. The appellee testified that "this type of potatoes are selling from $1.75 to $2.00" (R 89).

On cross examination the appellee had been asked the question as to whether these potatoes were designated as "Klamath U. S. No. 1 russets," and he replied in the affirmative. When the appellee used the expression "this type of potatoes," obviously he meant a "like grade of potatoes."

Tozzi, Streeter and Balley had all been engaged in the business of buying and selling potatoes commercially. All agreed that the market had been advancing, and, as a part of their duties, they should have been conversant with market conditions. The appellee testified that the market started jumping "right around March 20th on through there (R 89)."

Dunbar McManus Company was willing to pay $2.00 per cwt. for some of the potatoes, delivery not to be made "until right around May (R 90)," and that if the appellee had to withhold shipment to that com-

pany "one day after May 1st" he would have had to pay 10 cents on all of the potatoes (R 91). Appellee had been advised that this company could handle "some of the potatoes;" that this company would "buy them outright," and pay $2.00 per sack for the lot to be acquired by it, f. o. b. Klamath (R 90).

Counsel for appellant sought to draw unfavorable inferences from the fact that appellee in some preliminary correspondence had been quoting various prices to various parties. Irrespective of these rising market conditions the appellee had a contract with the appellant for the payment of $1.45 per cwt.

Q. Why did you make the statement then to your distributors that you could not get potatoes less than $1.45 to $1.55 naked, which, putting it on a parity with the Streeter potatoes, would amount to $1.55 to $1.65?

A. Well, when you taper down at Klamath Falls to about four or five growers, they will hold what they want—they will take the best and hold them for the best price. Why should I worry if I cannot get potatoes at $1.45 or $1.55; I had an agreement at that time with Mr. Streeter. (R 85).

Appellee testified that he had communicated with the United Brokers of Portland, Oregon, Dunbar McManus Company of San Francisco, and the L. A. Potato Distributors, Inc., of Los Angeles, with a view to selling these potatoes (R 73).

Q. Had you got to the point where you had quoted a price to them (R 75).

A. Yes, I had quoted a price; I had quoted a price

to Dunbar McManus and also L. A. Potato Distributors.

Q. What price did you quote to those parties?

A. I quoted a price of $2.00 f. o. b.

Q. Did either one of them accept this offer?

A. L. A. Potato Distributors accepted the quoted price.

Q. What price did you say?

A. $2 f. o. b.

Q. F. o. b. where?

A. Klamath Falls.

Q. That is in the State of Oregon, isn't it?

A. Yes (R 76).

Q. Had you sold these parties potatoes previously (R 77)?

A. Yes, I had.

* * *

Q. Had they furnished you with draft books (R 77)?

A. Yes, they have furnished me with draft books.

Q. (By Mr. Wiley) They had furnished you with blank forms of drafts to draw on them?

A. Yes.

Q. In shipping potatoes to them?

A. Yes (R 77).

Los Angeles Potato Distributors, Inc. agreed to pay $2.00 per cwt. for the 30 carloads of potatoes f. o. b. Klamath Falls, Oregon.

It was on March 29, 1940, according to Mr. Streeter's sworn statement (R 99), that appellee entered his office very hastily and asked him if he had sold the cold storage potatoes that he had previously shown him. The appellee told Mr. Streeter that he had to have "this lot somehow."

This conversation would indicate that the appellee, on that date, had in his possession the order of March 25, 1940 (Exhibit 10, R 94). It is not unreasonable to suppose that the appellee would not disclose the contents of such order to Mr. Streeter. Appellee had an acceptance of his offer to the Los Angeles Potato Distributors, Inc., of $2.00 per cwt. f. o. b. Klamath Falls. Hence, in order to fulfill his commitment it became of primary importance to appellee that he acquire "this lot somehow." Appellee could not very well have obligated himself for the payment of 10,851 sacks of potatoes without first having obtained a buyer. The appellee testified that the Los Angeles Potato Distributors, Inc. accepted the quoted price of $2.00 per cwt. f. o. b. Klamath Falls (R 75).

Appellee appears to have concentrated his efforts in making a resale of the potatoes, all of the thirty carloads, to the Los Angeles Potato Distributors, Inc. Appellee had quoted this company a price of $2.00 per sack by telephone, which telephonic offer had

been confirmed in writing by letter, dated March 25, 1940, Exhibit 10, which is as follows (R 94):

> Regarding the fancy sandland potatoes you bought and have stored in the ice house. I was thinking if you wanted to turn them we could buy 20 cars or all of them if you care to turn loose at this time at $2.00 f. o. b. the price as per our telephone conversation.
>
> I would like to leave them there for a while and take them as we need them. We could pay you half down and the balance when you load out the cars.
>
> I feel that we are taking a chance in buying so many at this price, but believe like you do that the market is going up and we are apt to make some good money on these providing they are as fancy as you say they are.
>
> We have bought several cars from you already and you certainly know quality, so we are trusting that these potatoes you have stored are as good as what you have been sending us.
>
> Please let us hear from you immediately. You had better get me on the phone tonight and let me know if you care to sell us these potatoes.

Appellee had been telephoning and corresponding with the Los Angeles Potato Distributors, Inc. in connection with a resale of the potatoes up to April 6, 1940, and considered that he had the potatoes "on contract" of sale with this company, as will appear from the following testimony, given on cross examination:

> Well, on those potatoes there, that deal, as I say,

I think it was the 3rd of April when I contacted Mr. Streeter, the storage deal arose, and all this time I was telephoning and corresponding with L. A. Potato Distributors of Los Angeles, and there was at that time potatoes on contract and I had this deal going through and it was a good deal; it looked good to me. I had them pretty well sold, and I would have made some good money; so I figured this deal was going through, that is all. (R 83-84).

That the appellee was concentrating on closing a deal with the Los Angeles Potato Distributors, Inc. for the sale of the potatoes is strengthened by the fact that he apparently showed this order (Exhibit 10) to the banker when making arrangements to borrow money for the purchase of the Tozzi potatoes.

The banker, Mitchell Tillotson, in his deposition (R 96) testified:

"He told me he had purchased potatoes from Mr. Tozzi and that the potatoes were sold to the Los Angeles Potato Distributors, or Ross Phillippi. We agreed with Mr. Balley we would honor his draft on that order, against the Los Angeles Potato Distributors, for the shipment he made to them; we agreed we would honor his draft on Ross Phillippi or the United Brokers—whichever he was drawing on—to the extent of one car at a time, and that car should be paid for before further drafts were honored."

Q. Let's come back to March, 1940; what type of document did you have from the Los Angeles Distributors guaranteeing the payment of drafts drawn on them by Mr. Balley?

A. We had an order or, he had an order from

them for the potatoes. (Underscoring supplied).

Q. You mean, an individual lot of potatoes; is that right?

A. An individual lot or whatever lot they ordered.

Furthermore, the Los Angeles Potato Distributors, Inc. had forwarded to the appellee a form of agreement to be used by appellee in the preparation of a form of contract to be signed by himself and the appellant when purchasing the potatoes from the appellant.

The appellant's agent refused to sign such a form of agreement when presented to him by the appellee, the appellee (R 70) testifying:

> Yes, it was a form that the Zuckerman & Company prepared, and it was sent by the L. A. Potato Distributors of Los Angeles, California, one of their contract forms. I drew this myself from that form.

On April 3, 1940, the appellee testified that the appellant's agent had for the first time introduced the question of the payment by the appellee of the accrued storage debt of the appellant. This demand doubtless caused the appellee considerable anxiety, and on the following day, April 4, 1940 (R 83), notified the Los Angeles Potato Distributors, Inc. of the demand so made. Appellee didn't believe he was obligated to pay the appellant's storage debt, but, apparently, desired to know the attitude of his customer on this controverted question over a transaction that

the Los Angeles Potato Distributors Inc. was directly interested in.

On page 13 of his opening brief appellant quotes from the Uniform Sales Act to the effect that:

> "the measure of damages * * * is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

Appellee has no quarrel with the appellant over this general doctrine. Appellee approves of this principle of law in support of the facts in this case.

As of April 6, 1940, at Klamath Falls, Oregon, as heretofore shown, the appellant in substance testified that the market value of 10,851 sacks of a grade of potatoes like those involved herein was $18,446.70, computed on the basis of $1.70 per cwt., which amount is in excess of $18,205.51, the sum found by the District Court to be not in excess of the fair market value of the potatoes at the time and place above mentioned. The appellee opined that the market value of "this type of potatoes" was from $1.75 to $2.00 per cwt. (R 89), and has been shown that the appellee had "on contract" the sale of the thirty carloads of the potatoes to the Los Angeles Potato Distributors, Inc., at $2.00 per cwt. f. o. b. Klamath Falls, Oregon, as of April 6, 1940.

As late as April 4, 1940, the appellee complained to the Los Angeles Potato Distributors, Inc., that the appellant was seeking to force him to pay the accrued

storage debt of the appellant, and if appellee had received word from this company prior to April 6, 1940, that it was cancelling, or attempting to cancel the order, there would be little likelihood that on April 6, 1940, appellee would be wiring to the appellant insisting that the contract had with the appellant's agent be performed in accordance with his understanding of the transaction. This offer and acceptance, confirmed by Exhibit 10, relating to the sale of the thirty carloads of potatoes destined for shipment from Klamath Falls, Oregon, to Los Angeles, California, remained unchanged and in effect as of April 6, 1940.

Bearing upon the question of the fair market value, appellant cites a number of authorities on the general principle concerning various combinations of circumstances, on pages 14-19 of his opening brief.

The first,

DUNCAN LUMBER CO. v. WILLAPA LUMBER CO., 182 PAC. 172, 93 ORE. 386,

which case affirms the general principle announced in the Uniform Sales Act previously quoted. However, the decision in this case turns on a point of law, not involved herein.

The second,

WATSON v. OREGON MOLINE PLOW COMPANY, 227 PAC. 278, 112 ORE. 414,

While in substance approving the doctrine quoted in

the Uniform Sales Act, involves facts and principles of law unimportant in the consideration of the instant case. In this case the plaintiff sought to recover lost profits equal to the amount of the commissions it might have earned upon the sale of ten tractors. It appeared however in this case that the loss of profits or commissions did not necessarily result from a breach of contract, and that a claim for losses of that character is one for special damages, the facts concerning which should have been specifically pleaded.

The last case cited,

SMITH v. WHITE, 48 FED. SUPP. 554,

appears to be not in point. The peppers in that case, upon arrival in Chicago, did not meet the grade specified. In the instant case there is no issue as to grade or quality. The purchaser in that case accepted delivery and notified the seller he would sell the peppers for the best price obtainable, thereby giving the seller no opportunity, upon rejection, to sell them at the prevailing fair market price. Had the seller been given such opportunity, he might have been able to mitigate the damage. In this case the peppers were delivered to the buyer. In the instant case the potatoes were not delivered to the buyer. Here the appellee never had an opportunity to deliver any potatoes to any one, because the seller refused possession to him.

On page 19 of his opening brief, appellant says:

> As to the ability of plaintiff to purchase a like grade and quantity of potatoes at Klamath Falls, Oregon, the Court could, and should, take ju-

> dicial notice of the fact that Klamath Falls is a potato raising center and shipping point, and just as nationally known as such as Riverside, California, as an orange center and Turlock, California, as a melon center; it would have been an easy matter for Balley to have shown the market value of these potatoes at Klamath Falls at the time of the breach.

Is it not a complete answer to point out here that the appellee had an acceptance of his offer of $2.00 per sack as of April 6, 1940, at Klamath Falls, Oregon, from the Los Angeles Potato Distributors, Inc.? Appellee was to pay the appellant the balance of the purchase price on April 6, 1940, and appellee expected to accept delivery of them, for shipment to Los Angeles, at Klamath Falls, Oregon, on April 6, 1940. Appellee would have been entitled to immediate delivery upon payment of the balance due on the purchase price.

When the appellant testified that the potatoes were worth fully a quarter above the price of $1.45 per cwt. he could have been testifying only as to value on April 6, 1940, at Klamath Falls, Oregon, because that is the location of the place where he had them stored, and it was on this day that the appellant's agent repudiated the agreement had with the appellee.

It is not altogether clear the appellant is endeavoring to raise the point that it became the duty of the appellee to buy "a like grade and quantity of potatoes" elsewhere upon the refusal of appellant to deliver the thirty carloads of potatoes to appellee. If so we cite the case of Duncan Lumber Co. v. Willapa Lumber Co., 182 Pac. 172, 93 Ore. 386, as our authority.

The defendant in this case had agreed to sell to the plaintiff Spruce lumber at $42.00 per thousand feet f. o. b. Chicago. The defendant failed to deliver some of the lumber, and plaintiff purchased it elsewhere for $61 and $66 per thousand feet. There was evidence that at the time set for delivery the market value was $75.00 per thousand feet. At $75.00 per thousand feet, plaintiff would have suffered a loss of $11,928.18, but he lost actually only $7,520.27 by having been able to purchase the lumber from another source for prices under $75.00 per thousand feet.

The Court held that while the plaintiff was not required to go into the market and purchase the goods elsewhere, before bringing his action, he may, if he sees fit, do so, and if, in a successful effort to minimize the damage, he incurs expense, he is entitled to recover such expenditures as an element of damage, so long as the total recovery does not exceed the difference between the contract price and the market price of the merchandise which the defendant failed to deliver in accordance with the terms of his agreement.

"Value" in its nature is rather vague; hence the rule for opinion testimony.

> "Market value of property, when used in the same sense as "value" is price property will bring in cash when offered for sale by one desiring to sell, but not obliged to sell, and bought by one desiring to buy, but under no necessity to do so. The word "value" usually signifies "market value," the terms being used interchangeably, and both are equivalent to "actual value" and

"saleable value." Taylor County v. Olds, Tex. Civ. App. 67 S. W. 2d 1102, 1103.

Southern Traction Co. v. Hulburt, Tex. 177 S. W. 551, 555.

Lawrence v. City of Boston, 119 Mass. 126, 128, 129.

In Oregon Code, Section 17-167, Oregon Compiled Laws Annotated, the expression "market or current price" is used.

Owing to the great variety of circumstances concerning which the term "market price" is to be considered, it has been said courts are not inclined to adhere to too literal a meaning of the term.

> "The word 'market' as used in the term 'market price' has not any fixed legal significance. The term 'market price' has no hard and fixed meaning. It has not a fixed and definite meaning which must attach to it invariably, in whatever contract it may occur, irrespective of the context or the surrounding circumstances. There is no magic in the term. When the term becomes a subject of legal controversy, it will be given that meaning which will best serve the purpose and intent of those who use it. The term has been variously defined as the actual price at which a commodity is commonly sold; the best price the owner could obtain after reasonable and ample time, such as would ordinarily be taken by an owner to make sale of like property; the current price; the general or ordinary price for which property may be bought and sold; the fair value of the property as between one who desires to purchase and one who desires to sell; * * * the price at which willing sellers are ready to take, and willing buyers

> are ready to give; * * * the rate at which a thing is sold. * * * 38 C. J. 1261.
>
> "'Market value:' 'the fair value of the property as between one who desires to purchase and one who desires to sell.'" 38 C. J. 1262.

APPELLANT'S ASSIGNMENT OF ERROR NO. 2

ARGUMENT

Appellant's assignment of error No. 2 is as follows:

> That the evidence was insufficient to justify the judgment in this: that there was no evidence whatsoever introduced in this case to prove what, if any, damages were sustained by Plaintiff as a result of the breach of contract by Defendant.

We believe that the evidence cited in our argument in opposition to appellant's assignment of error No. 1 completely refutes the appellant's contention in his assignment of error No. 2. The admitted facts are that appellant agreed to sell and deliver 10,851 sacks of potatoes to the appellee for the sum of $15,733.95; that appellant refused to make delivery to appellee, after retaining the down payment of $2500.00 on the purchase price. Appellant later resold the potatoes to third parties for a sum of $2471.56 in excess of the agreed price with appellee, to-wit: $15,733.95. And furthermore the appellee had a written order from the Los Angeles Potato Distributors, Inc. to purchase the potatoes from the appellee for the unit price of $2.00 per cwt. f. o. b. Klamath Falls, Oregon (R 94),

which unit price is in excess of the unit price of $1.45 per cwt. quoted to appellee by the appellant. Does not this "difference between the price at which Plaintiff agreed to pay Defendant for seed potatoes and the reasonable value of a like grade of potatoes at the time and place of sale" measure the damage that appellee sustained?

The amount of damages awarded to the appellee both by the United States District Court, and the Secretary of Agriculture, comprised two items, to-wit: The advance payment of $2500.00 on the purchase price, the payment of which is uncontradicted by the appellant, and the sum of $2471.56 received by appellant on a resale to third parties in excess of the amount under contract of sale to appellee.

The Secretary of Agriculture held (R 38):

> Under these circumstances the complainant became the equitable owner of the potatoes, and the complaintant may consider the respondent's resale of the potatoes as having been made for complainant's account. Therefore, the complainant is entitled to receive from the respondent any amount in excess of the contract price ($15,733.95) received by the respondent in connection with the particular lot of potatoes.

Enhanced Price and not Net Profits to be accounted for

We submit that this is a fair statement of law, and affords an additional ground for recovery by the appellee.

> Enhanced price secured by sale of property to third person in violation of contract, seller's duty to account for. 25 A. L. R. 1090.

In case of Phez Co. v. Salem Fruit Union et al, 201 Pac. 222 (Oregon case), this principle was announced:

> "But taking the allegations of the complaint to be true, the growers who signed Exhibit C should account to plaintiff for the difference in the price of berries sold to other parties and 3½ cents per pound, the contract price mentioned in Exhibit C."

The growers in this case sold their loganberries to parties other than the Phez Company through the union, on the ground, as claimed, that they had been released from their contract obligations because of the fact that the plaintiff, and union, had mutually cancelled the agreement of one of the growers.

The Court found that the growers each had separately agreed to sell their loganberries, through the union, to the Phez Company, hence no pool in the strict sense, there being no covenant binding the growers to each other, and the release of one individual grower could not affect in any way the contract between other growers and the union. The growers in this case breached the agreement on the mistaken notion that the plaintiff and union had violated the so-called pool agreement by consenting to the release of one of the growers.

In the instant case the appellant breached the contract to sell the potatoes to the appelle on the unsubstantiated ground that the appellee had violated the

agreement by refusal to pay the storage debt of the appellant.

Statute of Frauds

In passing it will be noted that there was no document in writing offered in evidence obligating the appellee to pay the accrued storage debt of the appellant. Statute of Frauds, Sec. 2-909, Oregon Compiled Laws Annotated.

> "The plaintiff, not having offered such writing, was without legal or competent testimony to sustain his allegation that the defendant assumed the obligation of Hopkins and agreed to pay the same." Turnham v. Calumet & Oregon Mining Company, 112 Pac. 711.

F. O. B. Defined

However, appellee contends there was no oral agrement to pay the accrued storage debt of the appellant. This contention is confirmed by the fact that all of the invoices (R 9-23) show that the price was $1.45 per sack, f. o. b. Klamath Falls, Oregon.

> The abbreviation 'f. o. b.,' for 'free on board,' used in the sale of goods, denotes the duty of the seller to deliver them free from all charges on board the vehicle or vessel of the carrier. Harmon v. Washington Fuel Co., 81 N. E. 1017, 1019, 228 Ill. 298.
>
> The abbreviation 'f. o. b.,' has a well defined business meaning, and, applied to the sale of merchandise destined for shipment, means that

it will be placed on a car or vessel free of expense to the buyer. Manganese Steel Safe Co. v. First State Bank of Peola, 125 N. W. 572, 573, 25 S. D. 119.

When Secretary of Agriculture found that there was damage to a specified extent, prima facie that damage is shown

The Perishable Agricultural Commodities Act, 1930, authorizing a trial de novo in the District Court of the United States, in the nature of an appeal from the proceedings, findings and order of the Secretary of Agriculture, provides, in part, that:

> "Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima facie evidence of the facts therein stated." (underscoring supplied) Title 7, U. S. C. A. p. 226.

The "Proceedings, Findings of Fact, Conclusions, and Order" were duly filed with the Clerk of the District Court of the United States for the Northern District of California, Northern Division, in accordance with the provisions of that Act (R 31-39).

Unless overcome by evidence to be brought forward by the appellant these "Findings of Fact" become the established facts, and the order a conclusive order, since the "finding of the amount of damages" is the "finding of ultimate fact."

No evidence, other than that offered before the deal with the Los Angeles Patoto Distributors, Inc. Secretary of Agriculture, was produced in the District Court of the United States.

Only a limited number of court decisions have been found interpreting the Perishable Agricultural Commodities Act, 1930, but there are numerous decisions interpreting the Interstate Commerce Act, in which is expressed a procedure for court action similar to that found in the statute involved herein.

In order to show the similarity of these respective provisions of law, we quote from both of these enactments.

Perishable Agricultural Commodities Act, 1930:

> "Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secreatry shall be prima facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court if appellee prevails he sall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs." Title 7, U. S. C. A. p. 226.

Interstate Commerce Act:

> Such suit "shall proceed in all respects like other civil suits for damages, except that on the trial of such a suit the findings and order of the commission shall be prima facie evidence of the facts therein stated, and except that the peti-

> tioner shall not be liable for costs in the district court nor for the costs of any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be fixed and collected as a part of the costs of the suit."

It would therefore seem proper to quote court decisions interpreting this portion of the Interstate Commerce Act as applicable to the similar portion of the Perishable Agricultural Commodities Act, 1930.

In the case of Cincinnati, N. O. and T. P. R. Co. v. Interstate Commerce Commission (Ga. 1896) 162 U. S. 184 (Title 49 U. S. C. A. p. 49) it was held that "the findings of fact by the Commission were, however, merely prima facie proof of the facts found, and could be overcome of other evidence." It is submitted that this expression can not mean "overcome by the same evidence." (underscoring supplied).

> "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." Illinois Central R. R. Co. v. Interstate Commerce Commission (La. 1907) 206 U. S. 441, 27 S. Ct. 700, 51 L. Ed. 1128.

It was held in the case of Barker-Miller Distributing Company v. Berman, 8 F. Supp. 60, No. 823 A, District Court, W. D. New York, involving the Perishable Agricultural Commodities Act, that:

> "Defendant can not attack the findings made by the Secretary on the basis of the evidence

presented before him, particularly when the record of such evidence is not before the court. * * *

"The present proceeding is not in the nature of an appeal from or review of that determination. It is a proceeding de novo, but, by virtue of the statute, the prima facie case made out by the findings and order of the Secretary of Agriculture will prevail unless overcome by evidence submitted by defendant." (underscoring supplied).

In action to recover award of Interstate Commerce Commission, hearing is de novo, but prima facie case made out by findings and order will prevail unless overcome by evidence. Blair v. Cleveland C., C. & St. L. Ry. Co. (D. C. Ill. 1931) 45 F. (2d) 792.

Under this section carriers have burden of bringing forward evidence to overcome presumptions created against them. Baldwin v. Scott County Milling Co. Mo. 1939, 59 S. Ct. 943.

"The Commission if it determines that any party is entitled to an award of damages under the provisions of the Act, shall make an order directing the carrier to pay to such party the sum to which he is entitled, and that, if the carrier does not comply with such order, any person for whose benefit such order was made may file in the federal court a petition setting forth the cause of action and the order of the Commission. The Act further provides that such suit shall proceed in all respects as other civil suits for damages, except that on the trial the findings and orders of the Commission shall be prima facie evidence of the facts therein stated. There is a further provision that, if the petitioner prevails, he shall be allowed to recover reasonable

attorney fees to be taxed and collected as a part of the costs. * * *

It may be that certain of that testimony is incompetent, and that certain comparisons claimed to have been relied upon by the Commission were improperly considered, but there is sufficient evidence competent in character to sustain the findings and order.

Defendants contend that there is a variance between the proof and the allegations of the petition * * *

I am of opinion that the Commission was not bound by the strict rules governing common-law proceedings, and had a right to make the order of reparation to the parties who were entitled to recover, irrespective of any technical variance between the proof and the allegations in the petition before the Commission.

Interstate Commerce Commission is not bound by technical rules in receiving and giving effect to weight of evidence, and its orders are not invalidated by its refusal or failure to adhere to strict rules of evidence obtaining in courts." Montrose Oil and Refining Co. v. St. Louis-San Francisco Ry. Co. (D. C. Texas 1927) 25 Fed. (2d) 750, affirmed (C. C. A. 1928) 25 Fed. (2d) 755.

"The Interstate Commerce Commission is not to be regarded as having acted arbitrarily in making a reparation order, nor may its findings and order be rejected as wanting in support, simply because hearsay evidence introduced without objection and substantially corroborated by original evidence clearly admissible against the parties to be affected was considered with the rest." Spiller v. Atchison, etc. R. Co. (Ms.

1920) 253 U. S. 117.

In view of the foregoing it would seem that the appellee is entitled to an affirmance of the judgment, and reparation order of the Secretary of Agriculture, on the ground that the appellant has not brought forward any evidence to overcome the presumptions created against him.

The appellant is reasserting his disagreement with the conclusions reached by the Secretary of Agriculture on the record as made, which conclusions were upheld by the District Court, and asking for a reversal as though this proceeding was one of strict appeal notwithstanding the provision of the statute to the effect that the findings of fact and order shall be prima facie evidence of the facts therein stated.

Should the appellant be permitted to retain this excess sum of $2471.56 it seems to us he would be enabled to unjustly enrich himself through his own wrongful act.

The Secretary of Agriculture found as an ultimate fact that the appellee had been damaged to that extent, in addition to the sum of $2500.00 down payment being withheld by appellant.

> "But when the Commission found that there was damage to a specified extent, prima facie that damage is shown." Mills v. Lehigh R. R. 238 U. S. 473.

We respectfully submit that such damage was not so found on an improper basis. The finding is supported in this case not only on the theory of the dif-

ference between the fair market value of the commodity and the contract price, but also under the rule of law that the seller must account to the buyer for any sum of money received from third parties in excess of the contract price had with the original buyer.

> "The prima facie presumption as to the correctness of the findings of facts by the commission includes a finding as to the amount of damages suffered by the complainant, where there is nothing in the report to show that such damages were assessed on an improper basis." Meeker v. Lehigh Valley R. Co. (Pa. 1915) 35 S. Ct. 328, 236, U. S. 412, 50 L. Ed. 644.

> "And where the Commission makes an award 'as reparation' this is a sufficient finding as to the 'damages' suffered by the complainant to make it prima facie evidence of the damages in an action to enforce the award. Mills v. Lehigh Valley R. R. (Pa. 1915) 238 U. S. 473, 35 S. Ct. 888, 59 L. Ed. 1414, reversing (1913) 207 F. 717, 125 C. C. A. 235, wherein Mr. Justice Hughes says: 'When the Commission made the award 'as reparation' they undoubtedly expressed the decision, as a matter of ultimate fact, that there was injury to this extent to be repaired. No other intelligent construction can be put upon their statement. If, as we held in the second Meeker Case, a finding of the amount of damages as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation; that is, to be made whole—to be compensated for a loss because of an illegal and unreasonable exaction; and the amount which they stated as the sum to bet paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation—to af-

ford the compensation. The statute was not concerned with mere forms of expression, and in view of the decision that a finding of the ultimate fact of the amount of damages is enough to give the order of the Commission effect as prima facie evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, prima facie the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case."

APPELLANT'S ASSIGNMENT OF ERROR NO. 3

ARGUMENT

Appellant contends:

> That the findings of fact and conclusions of law herein are not supported by the evidence in this; that there is no evidence whatsoever to support Finding No. 8 of the Findings of Fact for the reason that no evidence whatsoever was introduced which would show what, if any, damages were sustained by the Plaintiff as a result of the breach of contract by Defendant.

We respectfully submit that a complete answer to such contention has been shown in appellee's argument in rebuttal to appellant's contentions under both assignments of error Nos. 1 and 2.

It will be observed that the District Court of the United States for the Northern District of California, Northern Division, merely found, in its Finding No. 8, "that the sum of $18,205.51 does not exceed the fair market value of the 10,851 sacks of potatoes, the subject of this controversy, on April 6, 1940, at Klamath Falls, Oregon (R 53)."

It was held in Dean v. Hayes, 157 Pac. 558, 29 Cal. App. 689, that "a finding that the value of the land did not * * * exceed the sum of $500.00" was sufficient in law.

Whereas, in the instant case the Court gave the appellant the benefit of the contention in not awarding to the appellee necessarily the full amount of the damage that might have been sustained by the appellee in holding that the "sum of $18,205.51 did not exceed the fair market value of the potatoes," implying that the fair market value of the potatoes could be reasonably some amount in excess of $18,205.51.

Net Proceeds

Appellant argues, on page 20 of his opening brief, as follows:

> "Finding of Fact No. 8 states that Tozzi received on the re-sale of the potatoes net proceeds of $18,205.51. There is no evidence whatsoever to support this finding. The sum of $18,205.51 received by Tozzi on the re-sale of the potatoes was not net proceeds, but was gross proceeds."

On page 19 of this brief appears the following:

"gross profits which Tozzi realized on the sale of said potatoes at points outside of Oregon."

Whether such proceeds be designated as "gross" or "net" is of less importance than the fact that after the re-sale of the potatoes so much money was realized by the appellant, namely, $18,205.51, which amount is in excess of the total sum appellant had agreed to accept from the appellee.

Such proceeds should not be properly denominated as gross proceeds if in the disposal of the potatoes "outside of Oregon" the appellant had shipped some cars on consignment. The consignee, under such circumstances, would have deducted commissions, freight charges, etc., before remitting proceeds to the consignor. If some of the cars had been shipped f. o. b. destination, then the buyer could have deducted the freight charges, remitting the balance due to the seller. Under such circumstances it would have been perfectly proper to designate the proceeds as "net proceeds."

The appellant testified that "The buyer pays the cold storage charge, not the seller (R 99)." If we accept that statement the appellant collected the storage charges from the buyers, yet deducts $1660.70 as an expense.

Appellee never assumed and agreed to pay the cold storage charges. The record shows that the appellant breached the sales contract when he refused to deliver the potatoes because the appellee refused to pay such charges. Appellant now by indirection and, while a failing party to the transaction, unjustly

attempts to hold the appellee liable for such storage charges in the sum of $1660.70.

The appellant, when wrongfully re-selling the potatoes as belonging to himself, nevertheless claims a selling expense in the sum of $1085.10, chargeable to the appellee. (R 98). It does not appear that the appellant actually laid out any such selling expense. Appellant was charging the apellee with a brokerage fee of 10c per sack.

Q. Now, coming to this statement that you have prepared, Respondent's Exhibit G, you show a brokerage on 10,851 sacks?

A. Yes.

Q. Did you pay that out?

A. Some of it was paid out and some we charged for our own services.

Q. For your own services? Then you got that money, didn't you?

A. Why, certainly.

Q. But you deducted from that to pay yourself that amount?

A. It is custormary brokerage. (T. of T. 144).

We submit that the appellant is not entitled to take these deductions since the appellant and not the

appellee breached the contract; the enhanced price is to be accounted for, not the net profit.

Both the Secrteary of Agriculture and the District Court denied to the appellant the right to claim deductions for storage and brokerage.

Had appellee breached the agreement the appellant would have had the right to charge him with reasonable selling expenses, perhaps including brokerage, when re-selling the potatoes for his account. In case of loss, the buyer would have been liable to the seller for such loss; whereas, had the commodity been re-sold for a net profit, the seller would have been required to account to the buyer for the net profit, over and above the price he had agreed to sell to the buyer.

Here, however, the appellant breached the agreement. There was no covenant between the buyer and the seller that the seller would be allowed a selling expense when, acting without authority from the buyer, appellant re-sold the potatoes. Appellant was asserting unwarranted rights.

It seems to us that the appellant would have no more legal right to collect selling expenses, through his own wrongful act, that is, breaching the contract of sale, than one would have had in practicing deceit on his associates.

In the case of Moe et al v. Lowry, 194 Pac., 363, Moe was deprived of his stock interest in a mining company because he had misrepresented to his associates the cost thereof, the Court holding that Moe

was not entitled to recover the sum of $98.00 that he had expended in the promotion of the enterprise. Quoting from the decision:

> "When caught in his deceit why should he be permitted to change front and say he ought to be paid or allowed something that the agreement did not provide?"

INTEREST

The Secretary of Agriculture in his order of December 14, 1942, awarded interest to the appellee on the sum of $4971.56 at the rate of five per cent (5%) per annum from April 6, 1940, until paid, and the District Court in the judgment made and entered in this case (R 55-56) awarded interest on this amount "at the rate of five per cent (5%) per annum from April 6, 1940, to the date hereof (June 6, 1944), and thereafter at the lawful rate of interest."

Section 22 of Article XX of the Constitution of California fixes the legal rate of interest at seven per cent per annum.

The legal rate of interest in Oregon, Sec. 66-101, OCLA, is six per cent per annum.

Hence, the order of the Secretary of Agriculture was eminently fair to the appellant in fixing a rate of interest lower than that fixed in either the State of California or Oregon.

The Perishable Agricultural Commodities Act,

1930, Ch. 20A, United States Code Annotated, Title 7, p. 227, with regard to interest, provides:

> Unless the licensee against whom a reparation order has been issued shows to the satisfaction of the Secretary within five days from the expiration of the period allowed for compliance with such order that he has either taken an appeal as herein authorized or has made payment in full as required by such order his license shall be suspended automatically at the expiration of such five-day period until he shows to the satisfaction of the Secretary that he has paid the amount therein specified with interest thereon to date of payment. * * * (Underscoring supplied).

ATTORNEY'S FEE

The district court allowed the appellee an attorney's fee, as a part of his costs on appeal in that Court, in the sum of $250.00 (R 56).

Under the authority of the Oregon Code this Court did allow attorney's fees in the following cases:

> American Surety Co. v. Fischer Warehouse Co., (C. C. A. 9, Ore.) 80 F. (2d) 536, 540;
>
> Horwitz v. New York Life Ins. Co., (C. C. A. 9, Ore.) 80 F. (2d) 295, 302, 303.

The Perishable Agricultural Commodities Act, 1930, Ch. 20A, U. S. Code Ann., Title 7, p. 226, with regard to costs, provides that:

> Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as part of his costs.

While this provision of law applies more directly to appeals in the district court, yet it seems to us that the language is sufficiently broad to support an implied intention to allow attorney's fees as costs on a second appeal. The Act says that the appellee "shall not be liable for costs" if he prevails. Counsel fees are perhaps the greatest item of expense to be incurred in an appeal of this nature.

If the judgment in this case is affirmed, and we respectfully submit it should be, appellee requests that the Court allow him an attorney fee, to be taxed as a part of his costs, in such an amount as to the Court may seem reasonable; and that the judgment bear interest at the rate of five per cent per annum from April 6, 1940, to June 6, 1944, the date of the judgment in the district court, and from and after June 6, 1944, at the rate of seven per cent per annum until paid.

WILSON S. WILEY.